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In The

Supreme Court of the United States

October Term, 1975

No. 75-1187

UNITED STATES OF AMERICA ex rel. SHELDON SELIKOFF,

Petitioner,

vs.

COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

October Term, 1975

No.

UNITED STATES OF AMERICA ex rel. SHELDON SELIKOFF,

Petitioner,

vs.

COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT

Petitioner respectfully prays that this Court issue a writ of certiorari to review the order of the United States Court of

Appeals for the Second Circuit rendered the 21st day of October, 1975, rehearing denied November 26, 1975, which reversed an order of the United States District Court for the Southern District of New York which had granted petitioner's writ of habeas corpus on the grounds that the trial judge should have vacated Selikoff's guilty pleas *sua sponte*.

The United States Court of Appeals, however, stayed execution and issuance of the mandate pending determination of this petition for a writ of certiorari.*

After the commencement of trial upon one of four indictments, Selikoff interrupted the trial and pleaded guilty to one count of grand larceny second degree in full satisfaction of three of the four indictments which related to real estate deals, and pleaded guilty to one count of obscenity in the second degree in full satisfaction of the fourth indictment.

The District Court found as a fact that a promise not to incarcerate petitioner was indeed made by the trial judge at the time the pleas of guilty were obtained.

Subsequently, the County Court of Westchester County refused to honor its unqualified promise not to incarcerate petitioner and directed him to withdraw his pleas of guilty. This would have meant not only restoring the two pleas to trial status which had been taken, but also would have revived the other indictments which were dismissed as a result of the pleas of guilty. Petitioner therefore refused and the Court sentenced him to jail for a period of five years.

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* The docket in the United States Court of Appeals is 75-2085

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Appeals were subsequently taken to the Appellate Division of the Supreme Court in the Second Department. That court affirmed the judgment of conviction by a divided vote, *People v. Selikoff*, 41 App. Div. 2d 376, 343 N.Y.S. 2d 387, *aff'd.*, 35 N.Y. 2d 227, 360 N.Y.S. 2d 623, 318 N.E. 2d 784 (1974).

This Court denied petitioner's petition for a writ of certiorari from the New York Court of Appeals' affirmance; *Selikoff v. New York*, U.S. , 95 S. Ct. 806, 42 L. Ed. 2d 822 (1975).

The petitioner sought out a federal writ of habeas corpus pursuant to 28 U.S.C. §2254, on the ground that the trial judge's failure to fulfill his "unconditional promise" denied defendant due process of law and exposed him to double jeopardy.

The District Court directed that the habeas corpus writ be granted on the grounds that the trial judge should have vacated the pleas of guilty *sua sponte*, thereby permitting Selikoff to plead anew (393 F. Supp. 48 [S.D.N.Y. 1975]).

The United States Court of Appeals reversed the District Court but granted a stay of mandate pending determination of this petition for a writ of certiorari.

OPINIONS BELOW

The United States Court of Appeals reversed the United States District Court on October 21, 1975, under docket number 75-2085. That opinion is annexed to this petition and made a part hereof (1a).

The opinion of the United States District Court is reported at 393 F. Supp. 48 (S.D.N.Y. 1975).

The opinion of the New York Court of Appeals is reprinted in 35 N.Y.S. 2d 227, 360 N.Y.S. 2d 623, 318 N.E. 2d 784 (1974).

The opinion of the Appellate Division of the New York Supreme Court, which affirmed by a divided vote, appears at 41 App. Div. 2d 376, 343 N.Y.S. 2d 387 (2d Dept. 1973).

This Court, without an opinion, had previously denied a writ of certiorari directed to the New York Court of Appeals, *Selikoff v. New York*, —U.S.—, 95 S. Ct. 806, 42 L. Ed. 2d 822 (1975).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The order of the United States Court of Appeals was dated October 21, 1975, but a petition for rehearing was denied on November 26, 1975 (9a). The orders of the Court of Appeals are annexed (11a).

QUESTIONS PRESENTED

1. Whether petitioner Selikoff was denied due process of law when the trial judge arbitrarily and contrary to the wishes of defendant and the District Attorney, unilaterally broke a plea bargain agreement, despite no such recommendation in the presentence report warranting such action? (Fifth and Fourteenth Amendments)

2. Whether a trial judge who has made an unconditional promise not to incarcerate a defendant who has pleaded guilty to two counts of a multi-count set of four indictments, in satisfaction of all four, may compel such a defendant to waive his rights under the double jeopardy clause by withdrawing his plea of guilty and thereby exposing himself anew to all four indictments and all the counts therein? The Court must bear in mind that the pleas of guilty were taken after the commencement of the trial itself on one of the indictments. (Fifth and Fourteenth Amendments)

3. Whether a trial judge may unilaterally reject a plea bargain made in good faith by all parties after full discussions and disclosures by both the District Attorney and defense counsel, and following protracted discussions with the court, solely because of the judge's subjective and visceral feeling that he should not honor it? (Fifth and Fourteenth Amendments)

4. Whether *Santobello v. New York*, 404 U.S. 257, mandates enforcement of a plea bargain, absent fraud by one of the parties?

5. Where, as herein, a defendant cannot be returned to *status quo ante*, because his co-defendants are now out of the case, may a trial judge unilaterally dishonor a plea bargain agreement by merely offering the defendant the opportunity to withdraw his pleas of guilty, taken after the commencement of trial, to which alternative the defendant is opposed?

6. Whether this Court should clarify the enigma created by Justice Douglas' concurring opinion in *Santobello v. New York*, 404 U.S. 257, 263, wherein he indicated that while the states

should ultimately determine what is to be done in connection with disputed plea bargains, that the wishes of the defendant should be given great, if not contolling, weight? It is this enigma that has created the instant problem.

7. Whether plea bargaining retains any significance at all in view of the New York Court of Appeals' apparent holding that a judge may always renege on a promise for any reason whatsoever, so long as he offers a defendant an opportunity to withdraw his plea of guilty?

(a) The New York Court of Appeals does not recognize a reciprocal right on the part of the defendant to ask to have his plea of guilty withdrawn if he later determines that he was the victim of a misunderstanding or is unhappy with the deal. (Fifth and Fourteenth Amendments, Due Process and Equal Protection Clause)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments of the United States Constitution are involved herein. In addition, Section 390.30(1), New York Criminal Procedure Law, is also involved.

THE BACKGROUND OF THE CASE

Selikoff was indicted under New York laws for four separate multi-count indictments. Under three of these indictments Selikoff was charged with various crimes allegedly

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arising out of a complex real estate swindle. Under the fourth indictment defendant was charged with obscenity and related offenses.

Selikoff pleaded not guilty to all charges.

After the commencement of the trial upon one of the indictments which involved the alleged real estate swindle, the petitioner moved to withdraw his pleas of not guilty. This motion was made after extensive negotiations with the prosecutor and with conferences at the bench with the judge. An agreement was finally reached after discussions with high echelon personnel of the District Attorney's office and the defense counsel and the trial court.

Under this agreement, the defendant was assured that he would not go to jail. The defendant was told by the trial judge:

> "I have had a number of conferences with your attorney and with representatives of the District Attorney's Office with regard to the cases against you. Based upon the results of the conferences and conversations and the fact and representation made to the court, I indicated to the attorney and I am now indicating to you that in my opinion in the interest of justice that no incarceration of you is required and based upon this plea as to what other sentence I shall impose, I do not know and I make no promises."

The United States District Court found that Selikoff unquestionably was given the distinct understanding that he

would not be incarcerated if he pleaded guilty. It is to be noted further that unlike many, many other justices in the State of New York, the particular judge involved herein did not make the promise contingent upon the probation report or upon any other factor. The promise, therefore, was unconditional.

Even if the promise, however, had been conditioned upon the probation report (see Sections 390.20(1) of the New York Criminal Procedure Law), the court would not have been justified in changing its mind because the presentence report did not recommend that the promise not be enforced. Nor did the District Attorney recommend that it be rejected.

The remaining other defendants in the case proceeded to trial or disposition and in the event Selikoff were made to go back to trial, he would have to go back alone It is thus obvious that he cannot be put back in *status quo ante*. A severance has automatically been obtained.

While the United States Court of Appeals declares that there is authority in New York State that a trial judge cannot *sua sponte*, over objections of a defendant, cause a plea of guilty to be withdrawn, (Slip Opinion 235), it is obvious that if such a ruling violates due process and equal protection of the laws, that this Court certainly has jurisdiction to rectify it.

The New York Court of Appeals ruled in effect that while a trial judge for any reason whatsoever may cause a plea bargain to be broken so long as he offers the defendant an opportunity to withdraw his plea of guilty and go to trial, that such a reciprocal right does not exist for the hapless defendant.

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In other words, it is a unilateral promise, apparently, that is being made. The defendant is stuck with it, but the Court can change its mind at will. If the defendant determines that he was misled by the prosecutor into thinking that he had a very strong case, when in fact he had a very weak case, then, of course, the defendant is just out of luck. On the other hand, a trial judge can order the defendant to withdraw his plea of guilty or go to jail, as happened herein, for any reason whatsoever. For example, if the trial judge is convinced by the prosecutor that it was mistaken about the weakness of its case and now has a strong case, it might very well prevail upon the judge to cause the defendant to withdraw his plea of guilty and go to trial.

An article in the recent Harvard Law Review (Finkelstein, *Guilty Pleas* , 89 Harv. L. R. 293, 309) indicates that most pleas of guilty are obtained because the prosecutor has a weak case.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION OF THE UNITED STATES COURT OF APPEALS REVERSING THE UNITED STATES DISTRICT COURT'S GRANTING OF HABEAS CORPUS RELIEF, IS PREDICATED UPON A MISUNDERSTANDING OF THE FACTS OF THE CASE AND UPON A MISAPPLICATION OF THE LAW.

The United States Court of Appeals declared that the trial judge could not "*sua sponte*" order the withdrawal of the guilty pleas of the defendant and compel him to go to trial. The court cites the New York Criminal Procedure Law as authority. (N.Y.C.P.L. §§390.30[1]; 330.20[1]).

Even if the law were to be applied as the United States Court of Appeals indicated it should have been, namely that a trial court cannot pronounce sentence without a presentence report, the case at bar presents no obstacle. In the case at bar the presentence report did not recommend to the trial judge that the plea of guilty be ordered vacated. On the contrary, this was a whim of the trial judge's own idiosyncrasies. Neither the defense nor District Attorney nor Probation Department recommended a change in the plea bargain.

The United States Court of Appeals surmised that because of the existence of Criminal Procedure Law §390.20(1) requiring a report of a presentence investigation before sentence is pronounced, that all plea bargains are therefore tentative, we submit that such is not the law as it is applied, or at least should not be the law. First of all, the defendant is not informed of this fact.

This Court has stated in *McCarthy v. United States*, 394 U.S. 459, 467, n. 20, that where there is a misunderstanding, the plea of guilty cannot stand. See *Kelsey v. United States*, 3 Cir. 1973, 484 F.2d 1198; *Fong v. United States*, 9 Cir. 1969, 411 F.2d 1181, *cert. denied*, 396 U.S. 968.

In the *Fong* case, *supra*, the court indicated that where a defendant pleaded guilty and was told that he could be imprisoned, but nothing was mentioned of a fine, that the portion of the sentence which imposed the fine had to be vacated.

In the case at bar we have just the opposite, namely that *Selikoff* was told that he might be fined but was assured that he

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could not be incarcerated. Under these circumstances, it is respectfully submitted that the defendant's custodial sentence should be vacated and if the Court wishes, perhaps a fine could be imposed.

See also, *United States v. Lester*, 2 Cir. 1957, 247 F.2d 496, 500; *Von Moltke v. Gillies*, 1948, 332 U.S. 708, 724.

See also *Santobello v. New York*, *supra*, and *Marvel v. United States*, 380 U.S. 262.

The United States District Court obviously was aware of the fact that an unconditional promise not to incarcerate Selikoff had been made. Since he had only been led to believe that he could be put on probation or fined, the incarceratory portion of the sentence was a violation of due process of law.

The direction by the trial court that Selikoff should withdraw his pleas of guilty, we submit, was grossly unfair to Selikoff since it would have constituted a waiver of his double jeopardy rights because not only would the two counts to which he pleaded guilty be restored for trial, but all of the other indictments and counts therein would also be restored for trial.

The United States Court of Appeals for the Second Circuit declared at Slip Opinion 236, that the petitioner had already been accorded the relief to which he was entitled since "he has been allowed to replead." It added ". . . If the defendant's pleas were in any way induced by reliance on the trial judge's statements, the opportunity to replead fully remedied any due process deprivations stemming from such inducement."

The United States Court of Appeals' opinion completely overlooked the double jeopardy aspects of the dilemma into which the defendant was placed.

II.

THE UNITED STATES COURT OF APPEALS FAILED TO RECOGNIZE THAT THE OFFER OF THE NEW YORK STATE TRIAL JUDGE TO PERMIT SELIKOFF TO WITHDRAW HIS PLEAS OF GUILTY VIOLATED THE DOUBLE JEOPARDY PROVISIONS OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. COMPELLING SELIKOFF TO WITHDRAW HIS PLEAS OF GUILTY WOULD HAVE RESTORED NOT ONLY THE TWO COUNTS TO WHICH HE PLEADED GUILTY, BUT ALSO THE OTHER INDICTMENTS AND ALL OF THE COUNTS THEREIN AND WOULD HAVE COMPELLED HIM TO GO TO TRIAL ALONE SINCE THE OTHER DEFENDANTS' CASES HAD BEEN DISPOSED OF.

With respect to Point I, we wish to address ourselves to the fact that under the double jeopardy provisions of the Fifth and Fourteenth Amendments of the United States Constitution, the United States Court of Appeals failed completely to come to grips with this issue.

Nothing in the opinion of the United States Court of Appeals even touches on the question of double jeopardy. The defendant herein took his pleas of guilty after the commencement of his trial upon one of the indictments. So far as that is concerned, he obtained a mistrial by virtue of these

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pleas of guilty. The fact is obvious that jeopardy had already attached

Compelling the petitioner to withdraw his pleas of guilty conceivably would have eliminated the possibility that double jeopardy could be raised because it might have been deemed a waiver.

Selikoff, however, did not want to be exposed after he had terminated his trial, to any other jeopardy because of the fact that he had voluntarily assumed the consequences of a plea of guilty during the commencement of his trial.

The court, therefore, deprived him of his due process right to a fair trial by permitting him to abort the trial through a plea of guilty and then, without recommendations from the District Attorney, the defense counsel, or the Probation Department which issues presentence reports, the court *sua sponte* decided not to honor its promise. We maintain that this placed Selikoff on the horns of an impossible dilemma since it meant that he could no longer go to trial on the charge or charges with the co-defendants who he would have gone to trial with and, in addition, in effect the court was exposing him to additional jeopardy because of the fact that he had pleaded guilty during the actual commencement of one of his major trials.

In the motion for rehearing, the United States Court of Appeals was asked to address the question of double jeopardy, but did nothing about it. (See *United States v. Jorn*, 400 U.S. 470.)

A. The enigma and dilemma created by Justice Douglas' concurring opinion in *Santobello v. New York, supra*, should be clarified.

As this Court knows, in the *Santobello* case (which was argued by the writer of this brief), this Court agreed unanimously upon a reversal. It was split 3 to 3, however, on whether or not the plea bargain must be specifically enforced or not. Justice Douglas leaned toward specific performance, but sided with the three justices who remanded to the state court to determine what the state would recommend as a remedy.

Justice Douglas, however, indicated that great, if not controlling, authority should be given to the wishes of the defendant. By that we must interpret that he intended that the defendant be given an opportunity to determine whether he wanted a retrial or wanted the plea bargain.

The dilemma is heightened by the circumstances of the case at bar. In the case at bar, the defendant Selikoff was under four indictments and many counts. The District Attorney, after many discussions with the defense counsel and with the court, finally worked out a plea bargain which was approved by the court.

The court, without qualification, promised Selikoff that he would not go to jail if he pleaded guilty.

The application of Criminal Procedure Law §390.20(1) is not applicable since the presentence report did not recommend any change in circumstances. In that the United States Court of Appeals is clearly erroneous.

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We have also cited several decisions, both of this court and other courts, under Rule 11 of the Federal Rules of Criminal Procedure, such as *McCarthy v. United States, supra,* wherein it is held that where a defendant is misled in a plea bargain, that the bargain cannot stand and the plea of guilty must be vacated. We maintain that the plea of guilty must be vacated whether it is *sua sponte* or otherwise. In no event, however, can the defendant be punished as a result of the plea bargain when he was absolutely and unconditionally told that he would not be incarcerated. When we say "punished," we are talking about incarceration. We realize that a fine or probation remained a possibility.

The District Court apparently was aware that there was a misleading and unfair procedure that had occurred.

Merely giving the opportunity to the defendant to withdraw his plea of guilty meant that he went back to a trial court alone and without co-defendants and faced trial not only upon the two counts to which he pleaded, but upon all of the counts and indictments which had been dismissed.

Petitioner maintains that the court had no right to compel him to go to trial upon all of the counts and all of the indictments after he had aborted his own trial which had commenced and had agreed to plead to two counts in satisfaction of everything.

As we view it, if the District Court's recommendation that the plea of guilty be withdrawn *sua sponte,* the defendant-petitioner could only have been made to go to trial on the two counts which were the subject of his plea of guilty.

We think this Court has an obligation to make a ruling with respect to this aspect as well.

Under the circumstances, it is respectfully submitted that the only fair remedy would be to specifically enforce the promise, unless both the Court and the defendant agrees that it should not be enforced.

We maintain that plea bargaining, absent fraud, must be enforced specifically. We recognize that if the District Attorney, the defense counsel, or the Probation Department, had misled the trial judge, then of course there was a perfect right to order a withdrawal of the plea of guilty.

That is not the case at bar. There is no claim that anyone deceived the trial court.

What happened here was that the trial judge sat through the trial of co-defendants and listened to their testimony. Selikoff was no longer in that trial since he had pleaded guilty to two counts at the commencement thereof. He had no opportunity to confront witnesses; he had no opportunity to present evidence.

The court came to the conclusion on its own that it should not have made the plea bargain which it did. Nobody recommended that it withdraw the plea bargain.

The court on its own, however, decided that it wanted to do so.

Under these circumstances, we maintain that it was unconscionable and in violation of due process to do this

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because it exposed the petitioner not only to retrial on the two counts to which he pleaded, but on all of the four indictments and all of the counts therein.

If plea bargaining means anything, it must be a bilateral and not unilateral affair.

In New York State a defendant does not have the right to withdraw his plea bargain or to ask that his plea of not guilty be reinstated because after reflection he decides that it was not in his best interests to have done what he did.

Yet, the interpretation of the court below and the New York Court of Appeals necessarily means that a trial judge may unilaterally always fail to adhere to a plea bargain, despite absence of fraud, if for any reason whatsoever he decides that he does not choose to honor it. The only apparent requirement is that he offer the defendant an opportunity to withdraw his plea of guilty. We maintain that this is not a plea bargain, but it is an illusory bargain which binds only one party. This is not equal protection of the laws; it is a travesty of both due process and fundamental fairness.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals should be granted.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

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APPENDIX

OPINION OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 218 — September Term, 1975.

(Argued September 5, 1975 Decided October 21, 1975.)

Docket No. 75-2085

UNITED STATES OF AMERICA, ex rel. SHELDON SELIKOFF,

Petitioner-Appellee,

v.

COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK,

Respondent-Appellant,

and

THE PEOPLE OF THE STATE OF NEW YORK,

Intervenor.

Opinion of United States Court of Appeals

Before:

SMITH, HAYS, and MESKILL,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*, granting appellee's petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254.

Reversed.

IRVING ANOLIK, NEW YORK, NEW YORK, *for Appellee.*

ARLENE R. SILVERMAN, Assistant Attorney General of New York (Louis J. Lefkowitz, Attorney General of New York, Samuel A. Hirshowitz, First Assistant Attorney General, Burton Herman, Assistant Attorney General, on the brief), *for Appellant.*

JANET CUNARD BROWN, Assistant District Attorney of Westchester County (Carl A. Vergari, District Attorney of Westchester County, White Plains, New York, on the brief), *for Intervenor.*

HAYS, *Circuit Judge:*

The Commissioner of Correction of the State of New York, respondent, and the State of New York, intervenor, appeal from

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an order of the United States District Court for the Southern District of New York granting defendant Sheldon Selikoff's petition for a writ of habeas corpus. We reverse the order of the district court.

Selikoff was indicted in New York under four separate multicount indictments. Under three indictments Selikoff was charged with various crimes allegedly arising out of a complex real estate swindle. Under the fourth indictment defendant was charged with obscenity and related offenses. Defendant pleaded not guilty to all charges.

Shortly after trial commenced on one of the indictments which charged involvement in the real estate swindle, the defendant moved to withdraw his pleas of not guilty. This motion was made after extensive negotiation with the prosecutor and conferences with the trial judge. Under the agreement reached between the prosecutor and the defense, Selikoff pleaded guilty to one count of grand larceny in the second degree in full satisfaction of the three indictments relating to the real estate deal and to one count of obscenity in the second degree in full satisfaction of the fourth indictment.

At the time the revised pleas were entered the trial judge, directing his comments to the defendant, said:

> I have had a number of conferences with your attorney and with representatives of the District Attorney's Office with regard to the cases against

> you. Based upon the results of the conferences and conversations and the fact and representation made to the court, I indicated to the attorney and I am now indicating to you that in my opinion in the interest of justice that no incarceration of you is required and based upon this plea as to what other sentence I shall impose, I do not know and I make no promises.

These comments, Selikoff contends, represent an unconditional promise which must be specifically enforced.

After the entry of the guilty pleas, the trial judge presided at the trial of Selikoff's co-defendants. During this trial it became apparent to him that Selikoff's involvement in the real estate swindle was far more extensive than he had earlier believed. Moreover, Selikoff's pre-sentence report indicated that he denied any guilt under any of the indictments under which he was charged. These factors prompted the judge to advise the defendant a week before sentencing that his views of the necessity of incarceration had changed and an opportunity would be afforded for Selikoff to withdraw his guilty pleas. At sentencing the judge noted that the court had earlier been unaware of the extent of Selikoff's participation in the real estate scheme. Upon reconsideration in light of additional information, the court informed the defendant that good conscience and the interests of justice required the court to change its views regarding the need for defendant's incarceration. Selikoff was given an opportunity to withdraw his guilty pleas and reinstate his original pleas of not guilty.

Selikoff refused the judge's offer to vacate the guilty pleas. Instead, with the advice of counsel, he chose to affirm those pleas and insisted that he had an absolute right to be sentenced as promised when those pleas were accepted. When Selikoff again affirmed his guilty pleas he was sentenced to a maximum of five years imprisonment on the grand larceny plea and fined on the obscenity plea.

Defendant, asserting a right to specific performance, appealed his sentence. The Appellate Division and the New York Court of Appeals affirmed the trial court. *People v. Selikoff*, 41 App. Div. 376, 343 N.Y.S.2d 387 (2d Dept. 1973), *aff'd*, 35 N.Y.2d 227, 360 N.Y.S.2d 623, 318 N.E.2d 784 (1974). The United States Supreme Court denied defendant's petition for a writ of certiorari. *Selikoff v. New York*, —— U.S. ——, 95 S. Ct. 806, 42 LE2d 822 (1975). A writ of habeas corpus was then sought pursuant to 28 U.S.C. §2254 on the ground that the trial judge's failure to fulfill his "unconditional promise" denied defendant due process of law.

The district court found that the judge's representations at the time the guilty pleas were accepted reasonably led the petitioner to believe that no imprisonment would be imposed. The court, however, did not find that due process mandated fulfillment of the petitioner's expectations and therefore did not order specific performance. Instead, it held that due process required the trial judge to vacate the guilty pleas *sua sponte*, thereby permitting Selikoff to plead anew. 393 F. Supp. 48 (S.D.N.Y. 1975). We disagree.

Resolution of criminal cases by agreement between the prosecutor and defendant, and with the concurrence of the court, is "an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). In petitioning the district court for a writ of habeas corpus the defendant did not seek the vacation of his guilty pleas. At all times the defendant has stood by those pleas; the only question presented to the district court was the validity of sentence. While there is no absolute right to have a guilty plea accepted, *Santobello*, 404 U.S. at 262, *North Carolina v. Alford*, 400 U.S. 25, 38 n.11 (1970), *Lynch v. Overholser*, 369 U.S. 705, 719 (1962), the trial judge's discretion in accepting a guilty plea should not be overturned unless such plea or its acceptance by the court is constitutionally infirm. The defendant claimed no such infirmity as to his pleas; the infirmity alleged in his petition related only to sentence. Even after Selikoff was informed that imprisonment would be a consequence of pleading guilty he voluntarily chose to affirm his guilty pleas. The district court was in error in ordering a *sua sponte* vacation of validly entered and validly accepted guilty pleas.[1]

The relief the defendant sought before the district court — specific performance of the trial judge's sentence representations — was predicated on the assertion that those representations constituted an unconditional promise. We reject this contention.

1. The authority of a trial judge to vacate a validly accepted guilty plea *sua sponte* over the objections of the defendant has been denied by several New York cases. See *People v. Damsky*, 47 App.Div.2d 822, 366 N.Y.S.2d 13 (1st Dept. 1975), *People v. Griffith*, 43 App.Div.2d 20, 349 N.Y.S.2d 94 (1st Dept. 1973), *Sekaloff v. Hogan*, 41 App.Div.2d 815, 342 N.Y.S.2d 417 (1st Dept. 1973).

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The legislature of New York has, by statute, denied trial judges the authority to make any unconditional sentence promises to a defendant convicted of a felony before a pre-sentence investigation has been conducted and the court has received a written report. Specifically, section 390.20[1] of the New York Criminal Procedure Law (McKinney 1971) provides:

> In any case where a person is convicted of a felony, the court must order a pre-sentence investigation of the defendant and *it may not pronounce sentence until it has received a written report of such investigation.* (Emphasis added).

The trial judge was thus precluded, as a matter of law, from making any unconditional promise to Selikoff at the time his guilty pleas were accepted by the court. In the instant case, moreover, the trial judge specifically noted that his sentence representations were predicated upon "the fact and representation made to the court." Implicitly, then, the court conditioned any promises on the accuracy of the information before it and reserved final determination of sentence until the pre-sentence report was received.

Even though the trial judge may not have "unconditionally promised" defendant that there would be no incarceration, defendant alleges reliance on the judge's statements. Those statements failed explicitly to call the defendant's attention to the necessarily tentative status of the sentencing projections. Whether this failure justified defendant's reliance under the

objective tests imposed when a defendant seeks to withdraw a guilty plea. *Mosher v. LaVallee*, 491 F.2d 1346 (2d Cir.), *cert. denied*, 416 U.S. 906 (1974), *United States ex rel. Curtis v. Zelker*, 466 F.2d 1092 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973), is immaterial to determination of this appeal. The defendant has already been accorded the relief to which he was entitled since he has been allowed to replead. If the defendant's pleas were in any way induced by reliance on the trial judge's statements, the opportunity to replead fully remedied any due process deprivations stemming from such inducement.

The defendant seeks to impose principles of contract upon the plea bargaining process. Such principles, borrowed from the commercial world, are inapposite to the ends of criminal justice. High among those ends are the protection of the public from criminal behavior and the protection of the criminal defendant from indiscriminate punishment. New York seeks to achieve both these ends by requiring the preparation of a pre-sentence report. That report contains an analysis of information "with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education, and personal habits." N.Y. CPL §390.30[1] (McKinney 1971). It is only after receipt of this information that the trial judge can intelligently fashion the sentence appropriate for the particular individual before him.

Justice would be disserved by forcing the State to fulfill Selikoff's expectations by blind application of the contractual

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remedy of specific performance to plea bargaining. Rather, when a guilty plea is induced by an unfulfilled promise, the particular circumstances must be examined to determine the appropriate remedy. In *Santobello*, the Supreme Court expressly left it within the discretion of the State court to decide whether the circumstances of a case require that a plea bargain be specifically enforced or require instead that an opportunity to withdraw the plea be granted. *Santobello v. New York*, 404 U.S. 257, 263 (1971). Here the trial judge determined that justice was best served by the latter course and this determination was affirmed by the highest court of New York. Absent a showing of prejudice, due process does not require the intervention of this court to disturb that discretionary judgment. *Mosher v. LaVallee*, 491 F.2d 1346 (2d Cir.), *cert. denied*, 416 U.S. 906 (1974). See ABA Standards, Relating to the Administration of Criminal Justice, Pleas of Guilty §3.3(b) (1968).

The judgment of the district court is reversed.

ORDER OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of October one thousand nine hundred and seventy-five.

Present:

HON. J. JOSEPH SMITH

HON. PAUL R. HAYS

HON. THOMAS J. MESKILL
Circuit Judges,

United States ex rel. Sheldon Selikoff,

Petitioner-Appellee

v.

Commissioner of Correction of the State of New York,

Respondent-Appellant,

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Order of United States Court of Appeals

District Attorney of Westchester County,

Intervenor.

75-2085

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellee.

A. DANIEL FUSARO,
Clerk

s/ Vincent A. Carlin
Chief Deputy Clerk

ORDERS OF THE UNITED STATES COURT OF APPEALS DENYING PETITION FOR A REHEARING

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of November, one thousand nine hundred and seventy-five.

Present:

HON. J. JOSEPH SMITH,

HON. PAUL R. HAYS,

HON. THOMAS J. MESKILL,

Circuit Judges.

Docket No. 75-2085

UNITED STATES ex rel. SHELDON SELIKOFF,

Petitioner-Appellee,

v.

COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK,

Respondent-Appellant.

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Orders of the United States Court of Appeals Denying Petition for a Rehearing

THE PEOPLE OF THE STATE OF NEW YORK,

Intervenor.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of November, one thousand nine hundred and seventy-five.

Docket No. 75-2085

UNITED STATES ex rel. SHELDON SELIKOFF,

Petitioner-Appellee,

Orders of the United States Court of Appeals Denying Petition for a Rehearing

v.

COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK,

Respondent-Appellant.

THE PEOPLE OF THE STATE OF NEW YORK,

Intervenor.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

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